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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 CHRISTOPHER DIBLASIO,

14 Defendant.
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Case No. 2:10-cr-00456-LDG (VCF)
Case No. 2:14-cv-00514-LDG

ORDER

16 The defendant, Christopher Diblasio, moves pursuant to 28 U.S.C. §2255 to vacate,
17 set aside, or correct his sentence (#192), and further moves for appointment of counsel
18 (#194), and applies for leave to proceed *in forma pauperis* (#193). As it plainly appears
19 from the Court's initial consideration of the motion and the record of prior proceedings that
20 the defendant is not entitled to any relief, the Court will dismiss the §2255 motion and deny
21 the remaining motions as moot.

22 The underlying premise of defendant's motion is that the Supreme Court recognized
23 a new right in *Alleyne v. United States*, ____ U.S. ____, 133 S.Ct. 2151 (2013) that is
24 retroactively applicable to cases on collateral review. He further asserts that application of
25 this newly recognized right establishes that mandatory minimum sentencing system under
26 which he was sentenced violated his Fifth and Sixth Amendment rights.

1 Assuming that the Supreme Court recognized a new right in *Alleyne* that is
2 retroactively applicable to cases on collateral review, the defendant is not entitled to any
3 relief. In *Alleyne*, the Supreme Court overruled *Harris v. United States*, 536 U.S. 545
4 (2002) and concluded “that any fact that increases the mandatory minimum is an ‘element’
5 that must be submitted to the jury.” *Alleyne*, 133 S.Ct. at 2155.

6 In the present matter, the Court sentenced the defendant to a statutory minimum
7 sentence of ten years for violating 18 U.S.C. §924(c)(1)(A)(iii). Section 924(c)(1)(A)(i)
8 establishes a minimum statutory sentence of five years for using and carrying a firearm
9 during and in relation to a crime of violence. The minimum statutory sentence is increased
10 to seven years if the firearm is brandished, §924(c)(1)(A)(ii), and to ten years if the firearm
11 is discharged, §924(c)(1)(A)(iii). Thus, under *Alleyne*, brandishing and discharging a
12 firearm must be recognized as elements of respective offenses as they are facts that
13 increase the mandatory minimum sentence.

14 The record of prior proceedings in this case establishes that the defendant was
15 charged with violating 18 U.S.C. §924(c)(1). In support of that charge, the superceding
16 indictment charged that the defendant, during and in relation to a crime of violence, did
17 knowingly use and carry a firearm by brandishing and *discharging* said firearm. In pleading
18 guilty, the defendant admitted to discharging a firearm. The plea agreement expressly
19 recognized that the statutory minimum sentence for the offense to which the defendant was
20 pleading guilty was ten years. The Court, in accepting the defendant’s plea, expressly
21 notified him that the statutory sentence for the offense to which he was pleading guilty was
22 ten years to life.

23 The record of the proceedings establishes that the defendant was charged with the
24 element of discharging a firearm, was notified during the plea colloquy that the statutory
25 sentence for discharging a firearm during and in relation to a crime of violence was ten
26 years to life, and thereafter admitted to the element of discharging a firearm. Thus, the

1 defendant's Fifth and Sixth Amendment rights were not violated in connection with his
2 conviction and sentencing for violating §924(c)(1)(A)(iii).

3 Therefore, for good cause shown,

4 THE COURT **ORDERS** that Defendant's Motion Pursuant to 28 U.S.C. §2255 to
5 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#192) is
6 DISMISSED;

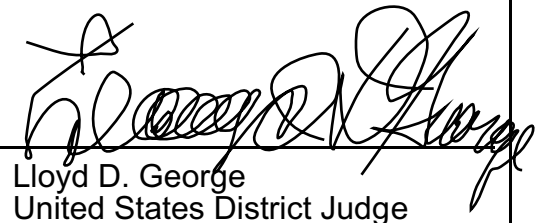
7 THE COURT FURTHER **ORDERS** that Defendant's Application for Leave to
8 Proceed *in Forma Pauperis* (#193) is DENIED as moot;

9 THE COURT FURTHER **ORDERS** that Defendant's Motion for Appointment of
10 Counsel (#194) is DENIED as moot;

11 THE COURT FURTHER **DENIES** a Certificate of Appealability as it plainly appears
12 from the motion and the record of prior proceedings that the defendant is not entitled to any
13 relief;

14 THE COURT FURTHER **ORDERS** that the Clerk of the Court shall serve a copy of
15 this Order on the Defendant.

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17 DATED this 10 day of April, 2014.

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20 Lloyd D. George
21 United States District Judge
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